SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

BRIEF FOR RESPONDENT.

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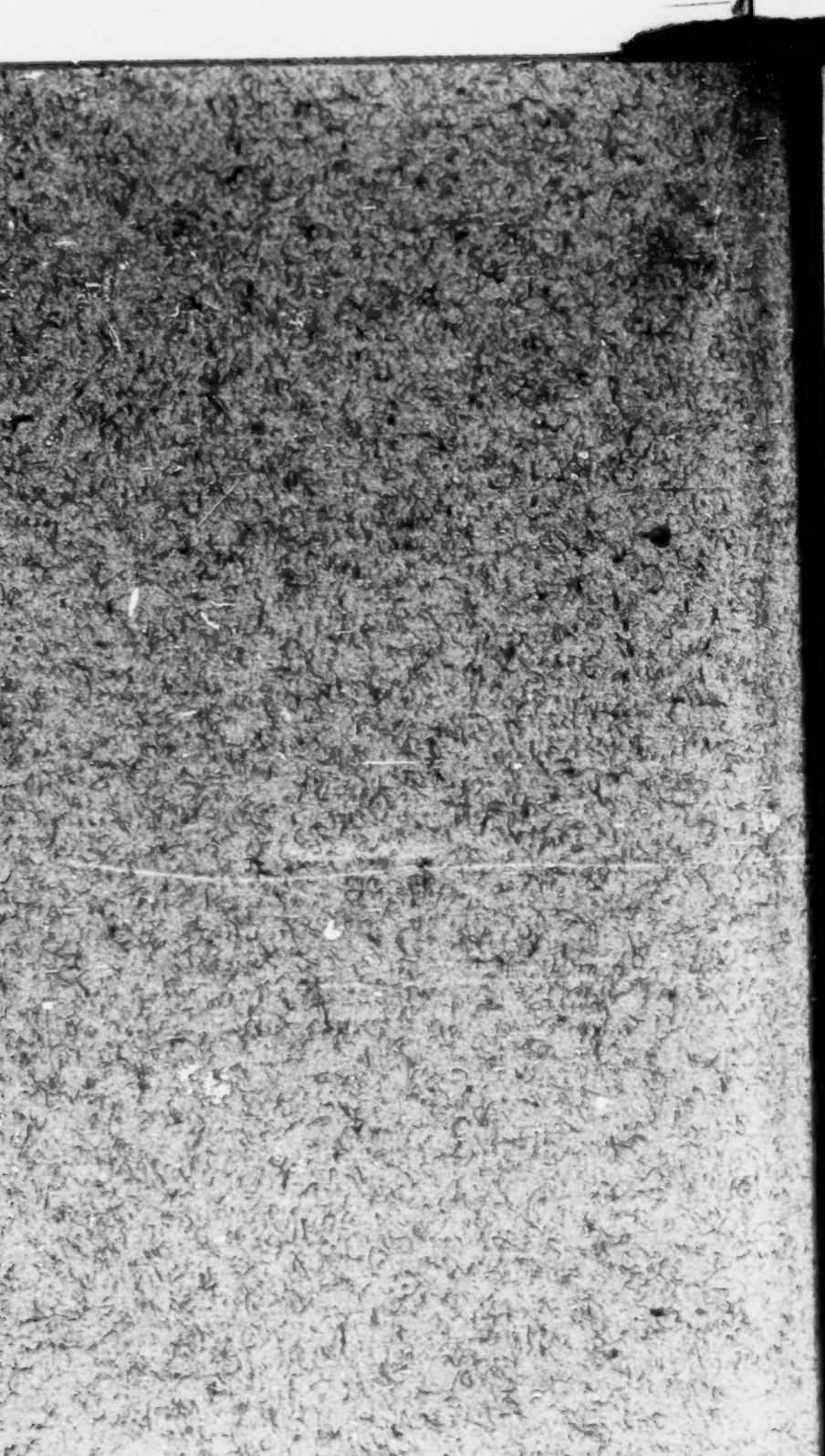

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BRIEF FOR RESPONDENT.

I.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 332 Pennsylvania 34 (Advance Sheets); 200 Atlantic Reporter 854; and also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Chancellor of the Court of Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

II.

Question Presented.

Can the Milk Control Commission of the Commonwealth of Pennsylvania, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce?

III.

Foreword.

In the instant case counsel for the respective parties agreed on a "case stated". On the basis of this case stated the issues were presented to the Court of Common Pleas of Dauphin County and to the Supreme Court of Pennsylvania. The arguments before the respective courts were based entirely on the admitted facts. Counsel for the respondent does not want to appear captious in this matter but a careful study of the petitioner's seventy-nine page brief indicates that facts are submitted to this Honorable Court which facts have not been agreed upon nor have they been proven. We are content to rely on the statement of the case presented on page five of the petitioner's brief.

In the first place, the petitioner has injected into its argument and has advanced as facts the reports of the Federal Trade Commission and there also appears a report by Cowden and Fouse on The Supply and Utilization of Milk in Pennsylvania (see page 31 of petitioner's brief). This report tends to establish a survey of the milk industry in Pennsylvania. We respectfully submit that since the figures advanced by the petitioner which were established by the report, have not been agreed upon or proven, we are not bound by them and respectfully ask this Honorable Court not to give any weight to them.

On page forty-nine of the petitioner's brief it is also stated that according to a recent survey, the percentage (with figures supplied) of milk handled in Pennsylvania is greatly disproportionate to the milk exported. This information was likewise obtained from a survey by Cowden and Fouse. The aforementioned objection would likewise apply to this phase of the petitioner's argument.

There is appended to the petitioner's brief (page 77) a petition addressed to the Honorable Henry A. Wallace, Secretary of Agriculture. We inform this Honorable Court that this petition was first seen by the respondent when it was submitted with the printed brief.

The Commissioner of Agriculture and Markets of the State of New York filed a brief to this instant case as *amicus curiae*. This brief is based upon surveys, articles, bulletins, reports and statistics, all of which do not conform with the agreed statement of facts in the instant case. It is all very interesting reading but the argument advanced in the New York brief applies to the State of New York where the milk situation is not on the same plane with the milk situation in Pennsylvania. We respectfully submit that reports of committees, and arguments based thereon, should not bear any weight with this Honorable Court, especially when the reports relate to situations entirely different from the situation in the instant case. We are bound by the statement of facts as agreed upon in the instant case but certainly any argument based upon facts not agreed upon have no legal value in deciding the issues in the present case. The New York brief cited authorities from various parts of this country on the question of the requirements and legality of bonds. We will take up the answer to the argument on the bonding feature in another portion of our brief.

The only issue before this Honorable Court, as we view it, is whether the Milk Control Commission of the Common-

wealth of Pennsylvania can, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce, under the stipulated facts.

IV.

ARGUMENT.

We present our argument under five points with a discussion under each point.

1.

Under the authority of the Farmers' Grain Company cases and related cases, the Milk Control Commission of the Commonwealth of Pennsylvania cannot, under the guise of stabilizing the milk industry of this Commonwealth, directly burden or regulate milk shipped in interstate commerce.

The Milk Control Act shows a comprehensive scheme to regulate the buying and selling of milk. Purchases can be made only by those who hold licenses from the Commonwealth. Such purchasers must file bonds conditioned for the prompt payment by the licensee of all amounts due to producers, under this Act and orders of the Board, for milk sold by them to such licensee subsequent to the posting of such bond. They also keep certain records. The milk can only be purchased subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority, the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

Applying the facts to the statute, it would appear that the statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania, and provides a system which enables the Milk

Control Commission to fix the profit which may be made in dealing with the subject matter of interstate commerce.

It is our contention that even if the regulations are not directed solely against interstate commerce but nevertheless, directly affect it, they must be declared invalid, regardless of the proportion which such commerce bears to the total commerce of the State.

In the case of *Public Utility Commission* v. *Attleboro Steam and Electric Company*, 273 U. S. 83, the court held on page 90:

> "The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business, it is none the less beyond the power of the state because this may be a smaller part of its general business."

In *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 92 Federal Reporter (Second Series) 580, at page 588, the court held:

> "Congressional regulation of such interstate business is in no way dependent upon the relative amounts of interstate or intrastate business done."

In *Consolidated Edison Company of New York* v. *National Labor Relations Board*, reported to Nos. 19, 25 October Term, 1938, and decided December 5, 1938, it appears that the petitioners are public utilities who in 1936 supplied about ninety-seven and one-half per cent of the total electrical energy in the State of New York. The companies do not sell for resale outside of the State. The companies supply the New York Central Railroad, the New York-New Haven and Hartford Railroad, the Hudson and Manhattan Railroad (operating a tunnel service to New Jersey), the

Western Union, Postal Telegraph and the New York Telephone Company. The petitioners likewise supply electrical energy to the Federal Government under contract for the lighthouses, harbor lights and post offices. The National Labor Relations Board maintains that it has jurisdiction over the petitioners in view of the fact that some of the electrical energy is supplied in interstate commerce and if industrial strife resulted interstate commerce would be crippled. The petitioners urge that the Legislature of New York had enacted adequate measures to protect against the interruption of petitioner's services through labor disputes by State Labor Relations Board. The State act follows closely the National act. Mr. Chief Justice Hughes, in writing the opinion of the Court, held:

> "It cannot be doubted that these activities, while conducted within the state, are matters of Federal concern. In their totality they rise to such a degree of importance that the fact that they involve but a small part of the entire service rendered by the utilities in their extensive business is immaterial in the consideration of the existence of the Federal protective power."

The Court further held that the effect upon interstate commerce through industrial strife would be far reaching.

Likewise, in the case of *Milk Control Board of the Commonwealth of Pennsylvania* v. *Eisenberg Farm Products*, 332 Pennsylvania 34 (Advance Sheets), at page 39, wherein the opinion of the court below is printed, the court held:

> "Undoubtedly the laws of Pennsylvania relating to milk control were not enacted for the primary purpose of regulating interstate commerce, but if they have that effect they are invalid as applied to such interstate commerce regardless of the proportion which such commerce bears to the total commerce of the state."

See also *Wallace* v. *Currin*, 95 Federal Reporter (Second Series) 856.

If the respondent in the instant case is required to pay the milk producers, not the agreed price, but the price fixed by the Commission and also to post a bond to secure payment to the producers of the prices fixed by the Commission, and also to pay license fees, the cost of the milk to it would be increased by the premium on the bond, by the license fee, and by the increase in price ordered by the Commission. The effect of such regulation and such price fixing would be exactly equivalent to the imposition of a tax on the export of milk.

In *Covington and Cincinnati Bridge Company* v. *Kentucky*, 154 U. S. 204, the Commonwealth of Kentucky attempted to prescribe a schedule of tolls upon a bridge connecting with the State of Ohio. This was done without the assent of Congress, and without the concurrence of such other State in the proposed tariff. The court held, page 212:

> "That, while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authority."

In the case of *Reading Railroad Company* v. *Pennsylvania*, 151 Wall. 232, the Legislature of Pennsylvania attempted to lay a tax on commodities transported in interstate commerce. The court held that the imposition of the tax, whether large or small, was a restraint upon the privilege or right to have the subjects of commerce passed freely from one State to another, without being obstructed by the intervention of State license. Its payment was a condition upon which the prosecution of that branch of commerce was made to depend, and its imposition, therefore, was in conflict with the power of Congress over the subject.

In *Gwin, White and Prince, Inc.*, v. *H. H. Henneford et al.*, reported to No. 75 October Term, 1938, and decided on Janu-

ary 3, 1939, the question before the Court was whether the State of Washington can levy a tax measured by the gross receipts of the appellant from its business of marketing fruit shipped from the State of Washington to other States. The defense claimed that the tax was a burden on interstate commerce. It was agreed that the shipment of fruit from the State of origin to points outside involve interstate commerce but the appellee contended that the appellant's activities in the State of Washington in promoting the commerce was a local business and subject to the State tax. Mr. Justice Stone, in writing the opinion, held:

> "Such a tax burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce."

In *Arkansas-Louisiana Pipe Line Company* v. *Coverdale*, 20 Federal Supplement 676, the State attempted to impose a tax on the horsepower of engines used in transporting the natural gas by pipe line from one State to another. Ninety-six per cent of the gas collected is transported in interstate commerce. The court held that the engines used to draw the gas from the wells were instrumentalities of interstate commerce, and any tax laid upon objects or articles passing in interstate commerce or the instrumentalities or agency by which it is carried on, is invalid and beyond the State power under the Commerce Clause of the Federal Constitution.

In the case of *United States* v. *Seven Oaks Dairy Company*, 10 Federal Supplement 995, the court held in addition to the proposition that the purchase of a commodity in one State for the purpose of transporting it to another State is a transaction in interstate commerce and not subject to burdens imposed by State regulations, that *where the business involved interstate commerce, State statutes regulating prices have been declared invalid as a direct burden*

upon interstate commerce. The court reviewed many authorities before arriving at its conclusion.

The highest court of the Commonwealth of Pennsylvania ruled that the instant case was controlled by the case of *DiSanto* v. *Pennsylvania*, 273 U. S. 34. In addition to this authority we urge upon this Honorable Court that the instant case is also governed by the *Farmers' Grain Company* cases, referred to hereafter.

The law as stated in the *DiSanto* case is a consistent statement of the law of the United States Supreme Court with respect to the issue involved. Mr. Justice Butler wrote the opinion in the *DiSanto* case and followed the principle of law established by the *Farmers' Grain Company* cases. Mr. Justice Brandeis filed a dissenting opinion wherein it was stated that the facts in the *DiSanto* case were unlike the facts considered in the *Farmers' Grain Company* cases, in that the statute in the *DiSanto* case did not affect the price of articles moving in interstate commerce, and that licensing and supervision of dealers in steamship tickets could be considered an inspection law. Mr. Justice Brandeis *distinguished* the facts in the *DiSanto* case from the facts in the *Farmers' Grain Company* cases without intimating that the law in the *Farmers' Grain Company* cases was not still the law, or that the law in the latter cases should be modified or changed.

We likewise urge upon this Honorable Court that the statute in the instant case could not be interpreted as an inspection law in view of the separate and distinct inspection laws passed by the Commonwealth of Pennsylvania and referred to hereafter in our brief.

The regulation sought to be imposed in the instant case is similar to the regulation sought to be imposed in *Lemke* v. *Farmers' Grain Company*, 258 U. S. 50. In that case a North Dakota Act required that purchases of grain could

be made only by those who hold licenses from the State, paid State charges for the same and acted under a system of grading, etc. defined in the act, and that grain could only be purchased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase. The defense was that the buying of grain in North Dakota for shipment to other States was interstate commerce and, therefore, the regulatory act of North Dakota was a direct burden on interstate commerce.

This Honorable Court outlined the control to be exercised under the State act, and enunciated the following principle of law:

> "That such course of dealing constitutes interstate commerce there can be no question. * * * That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. *That this is a regulation of interstate commerce is obvious from its mere statement.*" (Emphasis ours.)

This Honorable Court had reaffirmed the principle established in the case of *Dahnke-Walker Milling Company* v. *Bondurant*, 257 U. S. 282.

Three years later this Honorable Court had occasion to review and decide the very important case of *Shafer* v. *Farmers' Grain Company*, 268 U. S. 189. In that case the North Dakota Statute provided, among other things, a uniform system of grades, weights and measures and provided that a buyer operating a public grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance for wheat purchased, to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit, and to keep records of all purchases. The statute also required the State supervisor to investi-

gate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent, and authorized him to make rules and regulations to carry out the provisions of the act. The plaintiffs challenged the validity of the act under the Constitution of the United States on the ground that it interfered with and burdened interstate commerce. This Honorable Court held:

> "Buying for shipment and shipping, to markets in other states when conducted as before shown, constitutes interstate commerce—the buying being as much a part of it as the shipping. We so held in Lemke *v.* Farmers' Grain Company, *supra*, following and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford *v.* Wallace, 258 U. S. 495, 516; Binderup *v.* Pathe Exchange, 263 U. S. 291, 309; * * *."

We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. This no state can do consistently with the Commerce Clause.

In the case of *Public Utility Commission* v. *Attleboro Steam and Electric Company*, 273 U. S. 83, a Rhode Island corporation sold electricity to a Massachusetts corporation and transmitted the electric current to the State line. The Rhode Island Commission placed into effect a new schedule of rates which were opposed by the Massachusetts corporation. It was conceded in this case that the sale and transmission of electric current was a transaction in interstate commerce. The Supreme Court was confronted with two lines of cases, the one line of cases being headed by *Missouri* v. *Kansas Gas Company*, 265 U. S. 98, and the other

line of cases being headed by *Pennsylvania Gas Company* v. *Public Service Commission*, 252 U. S. 23. The Court followed the line of cases headed by *Missouri* v. *Kansas Gas Company* and held, page 90:

> "Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore, not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, *if such regulation is required it can only be attained by the exercise of a power vested in Congress.* See Covington and Cincinnati Bridge Company *v.* Kentucky, 154 U. S. 204, 220; Hanley *v.* Kansas City S. Railway Company, 187 U. S. 617, 620." (Emphasis ours.)

The court differentiated the facts in the *Kansas* case from the facts in the *Pennsylvania* case in the following manner: In the *Kansas* case natural gas was transported from Oklahoma and Kansas into Missouri and there sold to distributing companies which then sold and delivered the gas to the local consumers. In the *Pennsylvania* case natural gas was transmitted from Pennsylvania to New York where it was subdivided and sold retail to local consumers. The distinction was placed on the following ground: In the *Pennsylvania* case the service to the consumers was "essentially local", and the things done were after the business, in its essentially national aspect, had come to an end—the supplying of local consumers being "a local business", even though the gas is brought from another State. While in the *Kansas* case the sale of natural gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, "the paramount interest is not local but national, admitting of

and requiring uniformity of regulation," which "*even though it be the uniformity of governmental nonaction, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned.*"

We respectfully submit that the facts in the instant case are analogous to the facts in the *Kansas* case wherein the sale, transportation and delivery of milk constituted an unbroken chain, fundamentally interstate from beginning to end and that the paramount interest is not local but national, admitting of and requiring uniformity of regulation. We respectfully submit that the authority of the *Kansas* case which was relied upon in the *Attleboro* case can likewise be used as a supporting authority in the instant case.

This Honorable Court in the *Attleboro* case cited with approval the cases of *Shafer* v. *Farmers' Grain Company, supra, DiSanto* v. *Pennsylvania, supra.* The court further held that the regulation of rates between the two companies imposed a direct burden upon interstate commerce and since the forwarding State has no more authority than the receiving State to place a direct burden upon interstate commerce the rates must necessarily fall regardless of its purpose.

In *Buckingham Transportation Company* v. *Black Hills Transportation Company*, 281 North Western Reporter 94 (Advance Sheets), the South Dakota Railroad Commission attempted to exclude a motor carrier from interstate traffic because of the failure of the motor carrier to obtain a certificate from the Commission permitting it to operate over the State highways. Buckingham held a certificate from the Interstate Commerce Commission authorizing him to operate as a common carrier by motor vehicle in the course of interstate commerce over certain South Dakota highways, though he did not have a certificate to operate

as a common carrier over intrastate commerce within the State of South Dakota. The court held that the business of the motor carrier was interstate rather than intrastate in character and therefore the State Railroad Commission was without power to order the motor carrier to cease and desist from transporting such merchandise within the State without a permit to operate as a common carrier on the State highways.

In *J. D. Adams Manufacturing Company* v. *Storen*, 58 Supreme Court Reporter 913 (Advance Sheets), an Indiana Act imposed a tax on the receipt of the gross income of every resident of the State and of every nonresident, derived from sources within the State. It appears that the appellant in this case sold eighty per cent of its products in interstate commerce. This Honorable Court held (page 916):

> "We have repeatedly held that such a tax is regulation of, and a burden upon, interstate commerce prohibited by Article 1, Section 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce. • • • It is because the tax, forbidden as to interstate commerce, reaches indiscriminately and without apportionment, the gross compensation for both interstate commerce and intrastate activities that it must fail in its entirety so far as applied to receipts from sales interstate."

See also *Bluefield Products and Provision Company* v. *The City of Bluefield*, 196 South Eastern Reporter 568; *Gwin-White & Prince, Inc.* v. *H. H. Henneford et al.*, *supra*.

In *Pacific Telephone and Telegraph Company* v. *Henneford*, 81 Pacific Reporter (Second Series) 786, the State attempted to tax telephone equipment which was purchased at retail outside of the State and used within the State

for inter and intrastate business. The court held the tax invalid in so far as it taxes the use of an instrumentality of interstate commerce. See also *Arkansas-Louisiana Pipe Line Company* v. *Coverdale*, 20 Federal Supplement 676.

In *Port of Port Angeles* v. *Henneford*, 74 Pacific Reporter (Second Series) 1025, the State Tax Commission levied a business and occupation tax on corporations engaged in operating terminals upon the navigable waters of the State. Cargo moving through these terminals come from other States and are trans-shipped to other States. The dock companies do some business which is purely local in character. The court held that the dock companies' earnings from transporting goods arriving from other States are realized from operations in "interstate commerce" and hence not subject to state business and occupation tax.

In *Stafford et al.* v. *Wallace et al.*, 258 U. S. 495, livestock was consigned to the stockyards in Chicago where they were sold; some were slaughtered in packing houses within Chicago, while others were shipped to packing houses outside of the State of Illinois for slaughter. The question arose as to whether the above arrangement was a transaction in interstate commerce. The court held:

> "The principles of the Swift case have become a fixed rule of this court in the construction and application of the Commerce Clause. Its latest expression on the subject is found in Lemke *v.* Farmers' Grain Company, Ante. 50. * * * *Accordingly a state statute which sought to regulate the price and profit of such sales was found to interfere with the free flow of interstate commerce was declared invalid as a violation of the Commerce Clause.*" (Emphasis ours.)

The court cited numerous authorities upon which it based its decision.

We respectfully submit that the Milk Control Board is attempting to do what is expressly prohibited in a statement by this Honorable Court, the regulation sought to be imposed on the respondent by the petitioner is a regulation fixing the price and profit of milk shipped in interstate commerce, and under the authority of the *Stafford* case, and other related cases, it is expressly prohibited.

In the case of *United States et al.* v. *Seven Oaks Dairy Company*, 10 Federal Supplement 995, this Honorable Court, after an extensive review of all the authorities held:

> "And where the business involved interstate commerce, state statutes regulating prices have been declared invalid as a direct burden upon interstate commerce."

In *Baldwin* v. *Seelig*, 294 U. S. 511, a statute in New York attempted to regulate the price of milk to be paid in Vermont for shipment into New York. Without questioning the fact that the transaction was one in interstate commerce, the late Mr. Justice Cardozo, in delivering the opinion of this Court, said:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the thing transported * * *. *'It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.'*
>
> "Milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. * * * Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow

of commerce in its movement between states. Cf. Asbell *v.* Kansas, 209 U. S. 251 at 256; Railroad Company *v.* Husen, 95 U. S. 465 at 472." (Emphasis ours.)

In the case of *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, gas was transported from Oklahoma and Kansas into Missouri and delivered to distributing companies, who would then in turn sell the gas to local consumers. The State attempted to regulate the transportation of this gas. The Court held:

"But the sale and delivery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the Commerce Clause to secure and preserve. It is as though the commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state and before it had become part of the general mass of property therein. See Brown *v.* Houston, 114 U. S. 622, 634. There is nothing in Pennsylvania Gas Company *v.* Public Service Commission, 252 U. S. 23, inconsistent with this view."

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, the question before the Court was whether a State, wherein natural gas is produced, and is a recognized subject of commercial dealings, may require that in its sale and disposal, consumers in that State shall be accorded a preferred right of purchase over consumers in other States, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current, whereby it is supplied to consumers in other States. The Court held:

"By the Constitution, Article 1, Section 8, Clause 3, the power to regulate interstate commerce is especially

> committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the states have assented to it, all are alike bound by it, and all are equally protected by it."

We respectfully submit that the cases we have cited are on all fours in principle with the instant case. The requirements with respect to the securing of a license and the filing of a bond conditioned for the payment of milk purchased upon the terms and conditions as the Board may prescribe would, in the language of *Baldwin* v. *Seelig,* indirectly regulate the prices to be paid to producers of commodities in interstate commerce. Since the buying as well as the shipping of milk from Pennsylvania to New York constitutes interstate commerce, the Commonwealth cannot regulate incidents pertaining to the buying of milk in Pennsylvania, as it, by indirection, would affect the interstate character of the entire transaction. See *Pennsylvania Railroad Company* v. *Clark Coal Company,* 238 U. S. 456; *Talbot* v. *Smith,* 277 South Western 257; *Community Natural Gas Company* v. *Royse City,* 7 Federal Supplement 481.

In *Highland Farms Dairy, Inc.,* v. *Agnew,* 300 U. S. 608, a creamery company in Washington, D. C., purchased milk from farmers in Virginia and Maryland. It sold its entire output of bottled milk to a retail store in Virginia. A Virginia statute established certain regulations burdening to the milk industry. The Milk Commission of Virginia conceded that the creamery company of Washington, D. C., was not subject to the provisions of the statute, because its sales and purchases in Virginia were transactions in interstate commerce. It was held that the statute establishing a price

minimum would apply only to the milk sold in Virginia by a retailer within the established market area. The late Mr. Justice Cardozo stated the principle which we are urging upon this Honorable Court, as follows:

> "Highland in Washington may sell to High in Virginia and High may buy from Highland, at any price they please."

In *Motor Transit Company* v. *Railroad Commission of California*, 15 Federal Supplement 630, a State statute required each agent of a motor stage company selling tickets over highways of the State to procure a license and a five thousand dollar bond conditioned on the faithful performance of the contract of transportation. The transportation company operated across the State line and was engaged in interstate commerce. This Honorable Court, in declaring the act unconstitutional, held:

> "In our opinion the act, admittedly very indefinite in its terms, in effect offends against the commerce clause of the Constitution and that its enforcement is practically impossible, and any attempt to enforce it against complainants would act to their irreparable injury. • • • The decision of the Supreme Court in Di-Santo *v.* Commonwealth of Pa. 273 U. S. 34; 47 S. Ct. 267; 71 L. Ed. 524, is decisive upon that question."

We call this Honorable Court's attention to the condition of the bond in the above stated case as compared to the condition of the bond in the instant case. In the instant case the bond was conditioned upon the payment of the *price fixed* by the Milk Board. In the *California* case, *supra*, the bond was conditioned on the faithful performance of the contract of transportation. We respectfully submit that the instant case is a stronger case on its merits, as the effect of the requirement of the bond would regulate prices of commodities in interstate commerce, while the *California* case the

bond was merely conditioned for *faithful performance.* We will discuss the bond question in another portion of our brief when we take up the brief of the State of New York and compare it with the bond requirement in Pennsylvania.

In *Clover Fork Coal Company* v. *National Labor Relations Board,* 97 Federal Reporter (Second Series) 331, efforts were made to unionize petitioner's employees who worked in petitioner's mine. Petitioner owned two thousand acres of land in Kentucky and mined approximately three hundred thousand tons of coal per year, which it sold f. o. b. mine, and subsequently shipped in interstate commerce. Petitioners claimed that it was not engaged in interstate commerce; that its operations did not affect interstate commerce in view of the fact that all its activities were carried on in Kentucky. The court held that the effect of industrial strife upon interstate commerce is the test in determining the jurisdiction of the Congressional power. Even though the activities of the company are local in character, the matter, nevertheless, comes within the exclusive jurisdiction of the Federal Government in view of the fact that the subject matter attempted to be regulated would affect national industrial strife.

In *United States* v. *Corinth Creamery, Inc.,* 21 Federal Supplement 265, a Vermont creamery solicited and received milk as agents of producers, title remaining in the producers. The creamery sold milk to purchasers in Massachusetts. The creamery provided the transportation of the milk to the market and charged the producer a certain amount for the service, and then paid the net proceeds to the producer. The creamery produced no milk. The question arose as to whether or not the creamery was subject to the statutes and orders of the Agricultural Adjustment Act of the Federal Government. The court held, in effect, that the creamery was engaged in interstate commerce and was

subject to the regulations of the act. We call the Honorable Court's attention to the significance of this case as we feel it bears directly on the issue in the instant case. All the activities of the creamery company were purely local in character. The milk was received within the State of Vermont. The creamery company performed many services which were local in character. The ultimate destination of the milk was in interstate commerce. The court did not discuss the local activities of the creamery company in Vermont as being distinct from the interstate activities, and we respectfully submit that the local activities were not considered because the ultimate desination was in interstate commerce. This being true, the Federal Government had exclusive jurisdiction. The facts in the instant case can be likened to the situation in the *Corinth* case in that all the activities of the respondent were destined in interstate commerce, and hence it follows that the Federal Government would have exclusive jurisdiction.

We respectfully submit that under the authorities submitted on this phase of the case, the principle of law established by them should control the instant case.

2.

Munn v. Illinois and the Decisions of this Court based thereon, together with the other authorities relied on by the petitioner, do not control the instant case.

We have carefully examined the opinions of *Munn* v. *Illinois* and the subsequent cases based thereon, and cannot agree that this line of cases controls the present situation. We will take up the cases relied upon by the petitioner and point out to this Honorable Court their distinction from the instant case.

In *Munn* v. *Illinois*, 94 U. S. 113, the question was whether, as respects a public elevator devoted to storing grain for

hire, the State could regulate the storage charge, where part of the grain reached the public elevator, or was destined to leave it, through the channels of interstate commerce.

This Honorable Court found that the vast production of grain was limited to seven or eight great States of the west and said grain had to pass on the way to four or five other states on the seashore. The court further found that the situation as it existed in 1874 showed that the fourteen warehouses in Chicago were owned by thirty persons, nine business firms controlled them. The grain warehouses in Chicago held from three hundred thousand to one million bushels. The court further found that these public elevators stand in the very "gateway of commerce" and take toll from all who pass. That their business most certainly "tends to a common charge and is become a thing of public interest and use". The court further found that the business of public warehousemen was affected with a "public interest" and devoted to a "public use". The court further found that the business is likewise a "virtual monopoly." The court held, page 135:

> "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another."

Mr. Justice Field and Mr. Justice Strong filed a dissenting opinion. Mr. Justice Field based his opinion on the theory that the business of warehousemen was not "affected with a public interest" in that the right to do business was not given by the State. He further remarked, page 146:

> "It is only where some right or privilege is conferred by the government or a municipality upon the owner, which he can use in connection with his property, or by means of which the use of his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that the compensation to be received by him becomes a legitimate matter of regulation. Submission to the regulation of compensation in such cases is an implied condition of the grant. * * * When the privilege ends, the power of regulation ceases."

Mr. Justice Fields made a distinction between the privilege conferred upon a hackman or draymar. for the use of stands on the public streets, and the conduct of a warehouse, where no right or privilege is conferred by the Government upon the warehouseman. Mr. Justice Field further remarked appropriately:

> "But I deny the power of any legislation of our government to fix the price which one shall receive for his property of any kind. If the power can be exercised as to one article, it may as to all articles, and the prices of everything, from a calico gown to a city mansion, may be the subject of legislative direction."

Mr. Justice Fields further stated that the business of a warehouseman was at common law a private business, and did not require any prerogative or privilege of the crown to conduct said business. He further remarked that no reason can be assigned to justify legislative interference with the legitimate profits of that business, that would not equally justify an intermeddling with the business of every man in the community so soon, at least, as his business became generally useful.

The crux of the case in the majority opinion was based on the fact that the statute had no relation whatever to the purchase or sale of grain.

In the case of *Covington and Cincinnati Bridge Company* v. *Kentucky*, 154 U. S. 204, this Honorable Court distinguished the case of *Munn* v. *Illinois*, *supra*, on the ground that the decision in the *Munn* case was predicated on the principle that elevators were property "affected with a public interest". The court further remarked, page 213:

> "That the decision does not necessarily imply a power in the states to prescribe similar regulations with respect to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the Chief Justice, page 135, in delivering the opinion of the court * * *. The principle of this case has been recently affirmed in Budd v. New York, 143 U. S. 517 and reaffirmed in Brass v. North Dakota, 153 U. S. 391, though not without strong opposition from a minority of the court."

In *Budd* v. *New York*, 143 U. S. 517, the facts were very similar to the facts in the case of *Munn* v. *Illinois*. The court held that the business of elevating grain was "affected with a public interest", that when private property was devoted to a "public use" it was subject to regulation, that their business tended "to a common charge", and had become a thing of public interest and use, and that the toll on the grain was a common charge. The court followed the *Sinking Fund* cases, 99 U. S. 700, and stated that when a business becomes a matter of such "public interest" and importance as to create a "common charge" or a burden upon the citizens, in other words, when it becomes a "practical monopoly" to which the citizens are compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to the regulation by a legislative power. This statement was made by Mr. Justice Bradley in his dissenting opinion in the *Sinking Fund* cases, *supra*, but was regarded as the principle of the decision in *Munn* v. *Illinois*. The test

as applied by the courts seem to hinge on whether or not the business to be regulated was a "practical monopoly".

A review of the cases cited in *Budd* v. *New York* and their similarity to *Munn* v. *Illinois* indicates that the above test was applied to every situation that was to be regulated. We quote from page 545 of the opinion:

> "Not only is the business of elevating grain affected with a public interest, but the records show that it is an *actual monopoly*, besides being incident to the business of transportation and to that of a common carrier, and thus of a quasi public character."

The court did not seem to have any difficulty with respect to the operation of this statute *within* the state of New York, as is evidenced by the following statement, page 545:

> "So far as the statute in question is a regulation of commerce, it is a regulation of commerce only on the waters of the state of New York. It operates only within the limits of that state, and is no more obnoxious as a regulation of interstate commerce than was the statute of Illinois in respect to warehouses, in Munn *v.* Illinois. It is of the character with navigation laws in respect to navigation *within the state;* and laws regulating wharfage rates within the state, and other kindred laws." (Emphasis ours.)

Mr. Justice Brewer, Mr. Justice Field and Mr. Justice Brown filed an illuminating dissenting opinion, page 549. The dissenting members of the court state their views as follows:

> "The vice of the doctrine is, that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to wit, the state, has a right to create and maintain, and, therefore, one which all

> the public have a right to demand and share in * * *. But this public use is very different from a public interest in the use. There is scarcely any property in whose use the public has no interest. * * * I cannot bring myself to believe that when the owner of property has by his industry, skill and money made a certain piece of his property of large value to many, he has thereby deprived himself of the full domain over it which he had when it was of comparatively little value; nor can I believe that the *control of the public over one's property or business is at all dependent upon the extent to which the public is benefited by it.*" (Emphasis ours.)

The dissenting Justices further remarked that since there were no exclusive privileges given to these elevator men and that the elevators were not upon public ground, they cannot be considered a monopoly of fact, which can be broken by the building of additional elevators, and therefore there was no necessity for legislative interference. Mr. Justice Brewer wrote the dissenting opinion which was concurred in by Mr. Justice Field and Mr. Justice Brown, and made a very pertinent statement, page 551:

> "I believe the time is not distant when the evils resulting from this assumption of a power on the part of government to determine the compensation a man may receive for the use of his property, or the performance of his personal services, will be so apparent that the courts will hasten to declare that government can prescribe compensation only when it grants a special privilege, as in the creation of a corporation, or when the service which is rendered is a public service, or the property is in fact devoted to a public use."

The crux of the case in the majority opinion was based on the fact that the statute had no relation whatever to the purchase or sale of grain.

In *Brass* v. *North Dakota,* 153 U. S. 391, the facts were substantially the same as in the case of *Munn* v. *Illinois,*

supra. The court followed the decision of *Munn* v. *Illinois* on the theory that the business of warehousemen created a "common charge or burden upon the citizens, and that the said business was practically a monopoly." Mr. Justice Brewer, Mr. Justice Field, Mr. Justice Jackson and Mr. Justice White filed a dissenting opinion on the ground that no "practical monopoly" to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, has been shown to exist in the private enterprise of a warehouseman. The dissenting opinion further stated that the elevator man having originally engaged in a private enterprise, is now compelled by the decision in the case to receive, store and discharge the grain which is tendered to him, and also to insure and pay the cost of insurance, which cost can be more than he receives for the whole service. By the decision in the case, a warehouseman is compelled to accept business from others even though it was not his original intention.

The crux of this case was based on the ground that there was no restriction or regulation on the buying or selling of grain.

In *Champlin Refining Company* v. *Commission*, 286 U. S. 210, an Oklahoma statute attempted to regulate the amount of oil that could be produced in certain parts of the State. The plaintiff contended that the act and proration orders operated to burden interstate commerce in crude oil in violation of the Commerce Clause. The court held that the regulation leading up to the production can be regulated. In other words, the reduction to possession can be likened to the manufacture of an article, but once the article is in interstate commerce it cannot be regulated. The act applied only to production and not to sales or transportation of crude oil or its products in interstate commerce.

In *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, a Federal Act placed a supervision of the Board of Trade of Chicago

under the Secretary of Agriculture, and imposed conditions on the right to sell, in order to prevent the manipulation of prices or the cornering of grain by dealers on the Board. It appeared that grain was shipped into Chicago markets from other States, stored temporarily and sold on the Chicago Board of Trade, and later reshipped in large part to other States. The court said, on page 41, that the authority of *Munn* v. *Illinois* was not bothersome and concluded that the Chicago Board of Trade is engaged in a business affected with a "public national interest" and, subject to national regulation as such. We respectfully submit that this case can be cited with authority for the respondent in view of the fact that the facts in the *Olsen* case can be likened to the facts in the instant case. Since it is conceded in the instant case that the milk is in interstate commerce, following the authority of the *Olsen* case we conclude that it is a business affected with a "public national interest" and therefore is subject to national legislation.

In *W. W. Cargill Company* v. *Minnesota*, 80 U. S. 452, the act attempted to regulate the operation of elevator warehouses. Much of the act had been declared unconstitutional, but of the part that was sustained, the court stated, page 470:

> "The statute puts no obstacle in the way of the purchase by the defendant company of grain in the state, or the shipment out of the state of such grain as is purchased."

The court further remarked that the license had reference only to the business of the defendant at its elevator, and applied only to a business conducted at an established warehouse. We call this Honorable Court's attention to the fact that the *Munn* case was not relied upon in the above stated case.

In *Merchants Exchange* v. *Missouri*, 248 U. S. 365, the Court, relying upon the *Cargill* case, stated that the regula-

tion of weights and measures at elevators, used for the storing or transferring of grain for hire, was valid in view of the fact that it prevented fraud and facilitated commercial transactions. The act specifically applied to the business conducted at an established warehouse such as appeared in the *Cargill* case.

In *Mayor of New York* v. *Miln*, 11 Pet. 102, an act required the filing of reports by pilots of ships who enter the city of New York. The court held this to be a local regulation to prevent the importation of criminals and people of bad repute into the State, without the police having a record of it. This was a local regulation and applied only after the interstate character of the movement had ended. The act was clearly a quarantine law.

In *South Carolina* v. *Barnwell Brothers*, 303 U. S. 177, an act regulated the use of highways within the State of South Carolina. This act was clearly a safety measure.

In *Payne* v. *Kansas*, 248 U. S. 112, the requirements of a license and bond for commission merchants was limited to intrastate commerce. The question of interstate commerce was not brought into the case. The act related to local transactions within this State.

In *New Mexico* v. *Denver and Rio Grande Railroad Company*, 203 U. S. 38, an act provided for the inspection of hides that were to be exported out of the State. The act was labelled an inspection law for two reasons: first, to prevent the spread of disease and, secondly, to facilitate the detection of stolen hides.

In *Willson* v. *Blackbird Creek Marsh Company*, 2 Pet. 245, the State attempted to dam a creek where the tide ebbed and flowed. The defense advanced the argument that the act interfered with interstate commerce. The court held this a proper regulation because the value of the adjoining land was enhanced and the health of the people living thereby was improved. This was clearly a health measure

and no attempt was made to regulate the articles in interstate commerce.

In *People* v. *Peretta,* 253 New York 302, the act specifically regulated milk shipped and sold *within* the State of New York. No question was raised with respect to milk shipped in interstate commerce. The act was clearly a local regulation.

In *Federal Trade Commission* v. *Standard Education Society,* 58 Supreme Court 113, the act specifically regulated the use of trade marks. The question of interstate commerce or its regulation was not before the Court.

Thompson v. *Consolidated Gas Utility Corporation,* 300 U. S. 55; *Champlin Refining Company* v. *Commission,* 286 U. S. 210; *West* v. *Kansas Natural Gas Company,* 221 U. S. 229, all provide that regulatory measures, for conservation of their own natural resources, are not valid if interstate commerce is burdened.

In *Sligh* v. *Kirkwood,* 237 U. S. 52, the Florida act regulated the transportation of immature citrus fruit from the State of Florida to other States. The Court held this a health measure in that the reputation of the transporting State was at stake, and further that the health of the inhabitants of the other States would be jeopardized if immature citrus fruit was permitted to be exported.

The cases of *Patapsco Guano Company* v. *Board of Agriculture,* 171 U. S. 345; *National Fertilizer Association* v. *Bradley,* 301 U. S. 178; involve measures promulgated by the States in order to prevent fraud upon their own people in the purchase of commodities imported from other States, and also to prevent crime and detect criminals in the transporting of products from the State. The measures were confined to products within the State or about to come within the State. This class of legislation comes under the category of inspection laws.

In *Mintz* v. *Baldwin*, 289 U. S. 346, a New York act provided for the production of a certificate from the origin State to the effect that the cattle imported were free from disease. This was clearly a health measure for the protection of its own inhabitants.

In *Hall* v. *Geiger-Jones Company*, 242 U. S. 539, an act was passed to regulate the sale of securities within the State. The Court held that the regulation only applied to securities offered for sale within the State for the protection of the public against fraud.

In *Chassanoil* v. *Greenwood*, 291 U. S. 584, the court held that incidents leading up to the shipment of the commodity in interstate commerce are transactions in intrastate commerce. The Court further remarked that the *Lemke* case, *supra*, had no application as the regulations in the latter case imposed direct burdens on interstate commerce, while in the *Mississippi* case the regulation was directed to the transaction before it took on the interstate character.

In *Erie Railroad Company* v. *Board of Public Utility Commissioners*, 254 U. S. 394, an order directed the abolishing of grade crossings. The petitioner cites this case as an authority for the requirement of bonds. We respectfully submit that there is nothing in the case requiring the furnishing of a bond.

In *Hartford Accident and Indemnity Company* v. *Illinois*, 298 U. S. 155, a bond was required from those who sold produce within the State even though the produce was shipped from other States. The Court held that the produce lost its interstate character when it came to rest within the State of Illinois and was to be sold within the State and, hence a bond requirement for a local business was a valid regulation.

In *Smith* v. *Alabama*, 124 U. S. 465, a regulation required the examination of engineers before they could qualify for road service. The Court held the regulation valid for the

safety of the public, since it only applied to persons within the State.

In *Texas Transport and Terminal Company* v. *New Orleans*, 264 U. S. 150, and *McCall* v. *California*, 136 U. S. 104, a tax was imposed on the business of the sale of steamship and transportation tickets. The Court held that the business was interstate in character and any regulation thereof amounted to a burden and therefore was invalid. Both of these cases were cited with approval in the *DiSanto* case, *supra*.

The case of *Townsend* v. *Yeomans*, 301 U. S. 441, was strongly relied upon by the petitioner in the lower court for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. In this case an act of the Legislature of Georgia prescribed the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia, the tobacco was brought to the warehouse by the seller and there sold to buyers, who immediately ship the tobacco to other States. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers. *The act had no relation whatever to the buying and selling of tobacco and was carefully distinguished by this Honorable Court from the Farmers' Grain Company* cases, *supra*, by showing that the:

> "Georgia act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of warehousemen and their services to the growers in handling and selling the tobacco for their account."

This Honorable Court answered the proposition advanced by the petitioner by stating that a State is not permitted to regulate or place a burden upon interstate commerce and further found that the State statute under consideration did not impose such a burden. This Honorable Court said, page 847:

> "We find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. *The Georgia act does not attempt to fix the prices at auction sales or to regulate the activities of the purchasers.* The fixing of reasonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges." (Emphasis ours.)

This latter quotation clearly differentiates *Townsend* v. *Yeomans* from the instant case. In the instant case the respondent would be required to pay the milk producers not the agreed price, but the *price fixed by the petitioner*. In addition to the price regulation, the respondent would be required to post a bond conditioned for the payment to the producers of the prices fixed by the petitioner, and would be required to pay license fees. It can readily be seen that the cost of the milk would be increased by these regulations. We respectfully submit that the effect of these regulations and price fixing would be analogous to a *direct tax* on the milk shipped in interstate commerce.

The petitioner cites Section 11e of the Act under consideration, page 46, of its brief, wherein it is stated that milk shipped in interstate commerce shall not be included in the determination of the license fee, provided such milk is actually computed in determining the amount of such license fee in such other State. We respectfully submit this section of

the Act clearly indicates that the Commonwealth did not intend at any time to regulate milk shipped in interstate commerce in any manner whatsoever.

To summarize briefly the distinction between the line of cases relied upon by the petitioner and the cases relied upon by the respondent we quote from the opinion of the learned Chancellor below (R. 29):

> "The distinction between Munn *v.* Illinois, Townsend *v.* Yeomans, and other cases relied upon by the plaintiff, on the one hand, and the Farmers' Grain Company cases and the present case, on the other, lies in the fact that in the former *the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow,* but whose activities were entirely intrastate. In the latter cases the statute sought *to regulate the act of purchasing articles which were to be shipped in interstate commerce,* and to prohibit such purchases unless made upon terms prescribed by the statute and by administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk." (Emphasis ours.)

We respectfully submit that the expression of the learned Chancellor below which we have referred to, *supra,* is a well defined and a clear-cut common sense distinction. We therefore respectfully urge upon this Honorable Court that the line of cases relied upon by the petitioner are distinguishable from the instant case and are of no material value in the disposition of the instant case except to show their distinction.

3.

The desirability of a statute is not the test in determining its enforcibility, if the effect burdens interstate commerce.

However desirable it may be for the Pennsylvania Milk Commission to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the respondent and other buyers of milk, similarly engaged to effect this purpose, we contend that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

The petitioner contends that we should assume the existence of evils justifying the people of the Commonwealth of Pennsylvania in adopting the statute. We respectfully submit that the answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with the Commonwealth of Pennsylvania, but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interest of the people of all the States that are affected.

It is further alleged by the petitioner that the legislation before this Honorable Court is in the interest of the milk producers, and essential to protect them from fraud and to secure payment to them of fair prices for the milk actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce, placed by the Constitution under Federal control.

The right to buy milk for shipment and to ship it, in interstate commerce, is not a privilege derived from State laws

and which the State may fetter with conditions, but is a fundamental right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution.

We respectfully submit that in subjecting the buying for interstate shipment to the conditions and measures of control just shown, the statute directly interferes with and burdens interstate commerce, and is an attempt by the Commonwealth of Pennsylvania to prescribe rules under which an important part of such commerce shall be conducted. We respectfully submit that no State can do this consistently with the Commerce Clause.

The petitioner further contends that if the farmers are underpaid they will be tempted to save the expense of sanitary precautions. There is neither evidence nor presumption that such a situation will result. But, apart from such defects of proof, the evils springing from uncared-for cattle must be remedied by measures of repression more direct and certain than the creation of prices. In addition thereto, our milk inspection laws remedy any potential unsanitary conditions.

The petitioner urges in its brief, page 45, that in many aspects the present law under consideration before this Honorable Court is an inspection law. We respectfully submit that the present act cannot be interpreted as an inspection law in view of a series of acts designed especially for inspection measures.

For the information of this Honorable Court, we respectfully submit that there have been innumerable acts passed covering the period from 1853 to 1935 *prohibiting the sale of impure and unwholesome milk* and prescribing a host of regulations to insure such supply.

Act No. 210, approved July 2, 1935, provides as follows:

1. Definitions.
2. Permit: contents of the application.

3. Refusal, suspension or revocation of permits.
4. Renewal of permits.
5. Agency for issuing permits.
6. Inspection of dairy farms.
7. Designation of milk.
8. Raw milk; handling.
9. Records of receipts of milk.
10. Milk for pasteurization; defined.
11. Milk containers for pasteurization.
12. Pasteurized milk, defined.
13. Cleanliness of containers.
14. Milk plants.
15. Water supply of milk plants.
16. Bacteriological analysis.
17. Milk products.
18. Construction of act.
19. Rules and regulations.
20. Penalties.
21. Destruction of milk unsafe for health.
22. Restraining sale without permit.
23. Constitutional construction.

These *regulation* or *inspection* acts are separate and distinct from the Milk Act of 1937. This latter Act deals exclusively with the fixing of maximum and minimum prices of milk, whereas the former acts deal exclusively with regulations insuring pure and wholesome milk.

It is, therefore, obvious that the Milk Act of 1937 under consideration *cannot* be interpreted to be an *inspection law*. A reference to the Digest of the Pennsylvania Statutes (31 Purdons Statutes, 521-660g) discloses that at present there are many laws in force requiring strict sanitary precautions and providing severe penalties which apply directly to the evils described in the Preamble of the Milk Control Law. All milk producers must comply with these sanitary measures regardless of the price received by them for their milk. The Bureau of Milk Sanitation, Department of Health, Commonwealth of Pennsylvania, is specifically charged with

the duty of enforcing the sanitary regulations affecting the production of milk. This Bureau is separate from the Milk Control Commission and functions under a different set of laws which we have referred to as inspection laws.

The petitioner likewise urges that the act declares it to be the legislative intent that the price prescribed by the Commission for milk produced in this Commonwealth and sold in this Commonwealth for shipment into and sale in another State shall not be destructive of the price structure of producers in such other State. The effect of price fixing upon the price structure of producers in other States, however, is not the criterion. The test is whether the regulation and the price fixing amounts to a regulation of interstate commerce and places a burden upon it. If it does, it is beyond the power of the State and cannot be sustained.

We respectfully submit that the effect of the State statute in the instant case fixing prices as would apply to a sale in interstate commerce is a direct regulation and burden upon said commerce and under the numerous authorities is invalid.

4.

Does the right of a State, under the exercise of its police power, rise above the prerogative of the Federal Government to control interstate commerce, or, at least, exist until the Federal Government exercises some control over the subject matter?

It was contended by the State in the *Farmers' Grain Company* cases, as it is contended here, that the regulations could stand upon the principle which permits the State to make local laws under its police power in the interest and welfare of its people, which are valid although affecting interstate commerce, and stand, at least, until Congress has taken possession of the field under its superior authority to regulate commerce among the States.

We respectfully submit that the proposition advanced by the Commonwealth has no application where the Commonwealth passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. A State statute which, by its necessary operation, directly interferes with or burdens such commerce, is a prohibited regulation regardless of the purpose for which it was enacted.

In *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196, the Commonwealth of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted of ferrying passengers and freight between Pennsylvania and New Jersey. This traffic was held to be in interstate commerce. The court held:

> "*Congress alone, therefore, can deal with such transportation; its nonaction is a declaration that it shall remain free from burdens imposed by state regulation.* Otherwise, there would be no protection against conflicting regulations of different states, each legislating in favor of its own citizens and products and against those of other states. • • • And they may rely on the power of Congress to prevent any interference by the state until the act of commerce, the transportation of passengers and freight, is completed • • •." (Emphasis ours.)

In *Oklahoma* v. *Kansas Natural Gas Company*, 221 U. S. 229, the State of Oklahoma attempted to regulate the transportation of natural gas by foreign corporations engaged in interstate commerce. The court held, page 260:

> "At this late day it is not necessary to cite cases to show that the right to engage in interstate commerce is not the gift of a state, and that it cannot be regulated or restrained by a state, or that a state cannot exclude from its limits a corporation engaged in such commerce. • • • The inaction of Congress is a declaration of freedom from state interference with the trans-

portation of articles of legitimate interstate commerce, and this has been the answer of the courts to the contentions like those made in the case at bar."

In *Missouri* v. *Kansas Natural Gas Company*, 265 U. S. 298, a Delaware corporation transported gas from Oklahoma to Missouri and sold it to distributing companies in Missouri. The State of Missouri attempted to regulate the activities of the corporation and the corporation defended on the ground that their business was in interstate commerce and hence outside the scope of State regulation, even though Congress has not acted in the field. The court held:

> "But the Commerce Clause of the Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce. In Minnesota Rate Cases, 230 U. S. 352, 396, Mr. Justice Hughes, speaking for the court, said: 'If a state enactment imposes a *direct burden* upon interstate commerce, it must fall regardless of federal legislation. The point of such an objection is not that Congress has acted, but that the state has directly restrained that which in the absence of federal regulation should be free.' The question is so fully discussed in that case, that nothing beyond its citation is required."

In answer to the petitioner's argument that the milk industry should be regulated by the State in the interest and welfare of the public, we quote from the opinion in the *Missouri* case:

> "The contention that, in the public interest, the business is one requiring regulation, need not be challenged. *But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation.* See Robbins *v.* Shelby County Tax Industry, 120 U. S. 489, 493." (Emphasis ours.)

In *Pennsylvania Railroad* v. *Driscoll,* 198 Atlantic Reporter 130, the court held with respect to the power of a State to make regulations in the absence of Federal regulation:

> "When state laws destructively approach this exclusive sphere of federal control, it is then that supervision by the Commerce Clause must become effective, otherwise local regulation will become the rock upon which all interstate commerce power will break."

In *Pennsylvania* v. *West Virginia,* 262 U. S. 553, the question was whether the State could make conservation regulations of its own resources in the matter of natural gas in interstate commerce, in the absence of Congressional regulation. The court held, page 596:

> "By the Constitution, article 1, section 8, clause 3, the power to regulate interstate commerce is especially committed to Congress and therefore impliedly forbidden to the states. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation. * * * If there be need for regulating the interstate commerce involved, the regulation should be sought from the body in which the power resides."

We respectfully submit that the language in the *West Virginia* case rules the instant case. Since it is conceded in the instant case that the subject matter is in interstate commerce and if there be need for regulating the interstate commerce involved, the regulation should be sought from the body in which the power resides—Congress.

The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized the principle of law which we have established by authority. Section 1202 of the Milk Act provides that no provision of the law shall apply, or be considered to apply to foreign or interstate commerce,

except in so far as the same may be effective in accordance with the Constitution of the United States and the laws of Congress enacted pursuant thereto.

We respectfully submit that under the authorities, the principle of law which we are urging upon this Honorable Court is well settled and we ask this Honorable Court to conclude, in the language of *Missouri* v. *Kansas Natural Gas Company, supra:*

> "But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation."

5.

The requirement of a bond—its applicability in Pennsylvania as compared to its applicability in the State of New York and other States, as appearing in the brief filed for the Commissioner of Agriculture and Markets of the State of New York as amicus curiae.

Section 12 of the Act of April 30, 1936, P. L. 96; 31 Purdons Statutes, Section 684, which Act is known as the Pennsylvania Milk Control Board Law, provides that:

> "A license shall not be issued to a milk dealer purchasing milk from producers within this commonwealth unless the milk dealer shall execute and file with the application a personal bond approved by the board, * * * conditioned for the prompt payment by the licensee of all amounts due to producers, under this act and the orders of the board, for milk sold by them to such licensee subsequent to the posting of such bond, upon such terms and conditions as the board may prescribe."

The interpretation of this section clearly indicates that a milk dealer must post a bond to secure payment to the producers of the *prices fixed by the petitioner.* We call this

to the attention of this Honorable Court as distinguished from the requirements of the filing of a bond to pay the milk producers the *agreed price.*

In the State of New York, Section 258b of the Agriculture and Markets Law entitled Bonds and Enforcement, it is provided that:

> "Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, * * * and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year."

We respectfully point out to this Honorable Court that the bond requirement in the State of New York is not conditioned on the payment of prices fixed by the Milk Board but is conditioned upon the payment of the *agreed price* between the milk dealer and the milk producer. There is a vast distinction in legal effect between the requirement of filing a security conditioned for the payment of a price fixed by a State and the payment of a mutual contract price.

On the authority of *Stafford* v. *Wallace, supra,* it was held that a State statute which sought to regulate the price and profit of such sales which were found to be in interstate commerce was invalid as a violation of the Commerce Clause. The requirement of a filing of a bond under the condition mentioned is similar to the regulation sought to be imposed in *Lemke* v. *Farmers' Grain Company, supra,* the court in holding the buying and shipping of grain was in interstate commerce, declared the act unconstitutional on the ground:

> "That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce is obvious from its mere statement."

We respectfully submit that under the authority of the two cases cited, the fixing of prices and the determination

of the profit to be made by milk dealers engaged exclusively in interstate commerce, together with the requirement of a filing of a bond conditioned for the payment of a price fixed by the petitioner is, in the language of the *Lemke* case a "regulation of interstate commerce which is obvious from its mere statement."

The bond requirements of the State of New York do not approximate the bond requirements of the Commonwealth of Pennsylvania and we respectfully submit that a bond conditioned for the payment of an agreed price of a commodity might be enforcible for the protection of the public against fraud but this is quite different from the requirement of the Pennsylvania Act with respect to the bond requirement.

In the case of *Nebbia* v. *New York*, 291 U. S. 502, the Milk Act of New York was declared constitutional. But we respectfully submit that the licensing, bonding and price fixing of the New York act applied to the milk industry *within* the State of New York. Interstate commerce was not involved in the *Nebbia* case. We therefore conclude that there is a vast legal distinction between the requirement of a filing of a bond in New York for *intrastate* milk and the requirement of a filing of a bond in Pennsylvania for a subject matter in interstate commerce.

The authorities cited in the New York brief sustaining the validity of the bond requirement can rise to no higher level than the decision of *Harrisburg Dairies, Inc.*, v. *The Milk Control Commission*, which opinion was appended to petitioner's brief and marked Appendix A. The bond regulation in Pennsylvania was sustained as a valid police regulation insofar as it applied to intrastate commerce.

We are led to believe, after reading the footnote on page 23 of the New York brief that the Milk Control Law of New York had not proved satisfactory. It appears that the retail milk prices are no longer established by law in New York,

and payments to producers may be fixed by agreement under the New York laws of 1937.

In the instant case the petitioner would seek to regulate the prices and profit of milk shipped in interstate commerce and, in addition, compel us to file bonds conditioned for the payment of the *prices fixed* by the Milk Commission. This type of regulation was ruled invalid in the case of *United States* v. *Seven Oaks Dairy Company, supra,* wherein it was stated:

> "And where the business involved interstate commerce, state statutes regulating prices have been declared invalid as a direct burden upon interstate commerce."

With respect to the bonding requirements in other jurisdictions cited in the New York brief, the State of Vermont does not require the filing of bonds conditioned for the payment of prices fixed by the Milk Commissioners. The requirements of a bond for milk dealers in the State of Vermont is practically the same as the requirement in the State of New York.

The State of California provides for milk bonding which is conditioned for the payment of amounts due producers. The amount of the bond is determined by the quantity of milk purchased by a distributor and not by the prices fixed by the Milk Commission.

The State of Indiana provides for a milk bond conditioned for the prompt payment of all obligations to producers when due. This likewise is similar to the New York Act.

The Commonwealth of Massachusetts provides for milk bonds conditioned upon the prompt payment of all amounts due to producers for milk or cream sold by them to the licensee during the period for which the application for license is made.

The State of Minnesota provides for a milk bond similar to the one provided for in Massachusetts.

The State of New Hampshire provides for a milk bond similar to the one in the State of Minnesota.

The State of New Jersey provides for a milk bond similar to the one in the Commonwealth of Massachusetts.

The State of Wisconsin provides for a milk bond similar to the one in the State of New York.

In Canada, the Province of Ontario, provides for a milk bond similar to that of New York.

We respectfully submit that the bonding requirements in the States enumerated above, all require the filing of milk bonds conditioned for the prompt payment to producers of the agreed amounts owing to the producers. This is quite different from the requirements of the milk bond in the instant case, where the condition of the bond is determined by the *price of milk fixed by the Milk Commission.*

The case cited in the New York brief of *E. Pat Kelly* v. *The State of Washington,* 302 U. S. 1, is clearly an inspection measure as has been determined by this Honorable Court.

The other points raised in the New York brief have been carefully discussed in our brief and it is unnecessary to take up these matters again in answering the New York brief.

We respectfully submit that the legal distinction between the requirements of a bond under the Pennsylvania Act and the requirements of a bond under the Act of New York and other sister States is based on the lack of the *price fixing feature* as a condition of the bond. We urge upon this Honorable Court that the price fixing feature as it appears in the bond requirement in the Milk Act of the Commonwealth of Pennsylvania is a direct burden upon interstate commerce, and under the authorities cited, contravenes the Commerce Clause, and is invalid.

Conclusion.

We respectfully submit that the right to regulate interstate commerce in the milk industry of the United States is exclusively vested in Congress. If the Commonwealth of Pennsylvania were permitted to make its own regulations concerning interstate commerce, the other forty-seven States would do likewise, and the milk industry of the United States would become unstabilized to the detriment of the dairy farmer and consuming public.

We would then find ourselves back to the time of the Constitutional Convention when each State wanted to be free and independent and not subject to a national body, which would have exclusive jurisdiction over matters of national importance.

We respectfully submit that the development of this country has been built on several forces. One of them has been its vast free market. If we were now to turn back the clock one hundred and fifty years and were to break the country into forty-eight small markets, and even hundreds of smaller markets, the end of our progress is in sight.

In conclusion, we respectfully ask this Honorable Court to sustain the principle of law enunciated in the opinion of the learned chancellor below which was based on the *Farmers' Grain Company* cases and related cases, *supra*, and sustained by the Supreme Court of Pennsylvania.

Respectfully submitted,

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